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The Commonwealth of Massachusetts
Executive Office of Public Safety
Fire Safety Commission

Automatic Sprinkler Appeals Board

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CHAIRMAN

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VICE CHAIR

Docket # 2006-98
565 Boylston Street
Boston, Massachusetts

AUTOMATIC SPRINKLER APPEALS BOARD
DECISION AND ORDER

A) Statutory and Regulatory Framework

This is an administrative appeal held in accordance with Massachusetts General Laws Chapter 30A; Chapter 148, section 26G½ and Chapter 6, section 201, relative to a determination of the Boston Fire Department, requiring the installation of an adequate system of automatic sprinklers in a portion of a building leased by Cantona Inc. which operates a business known as the Globe Bar & Grill (hereinafter referred to as the Appellant). The building, which is the subject of the order, is located at 565 Boylston Street, Boston, MA.

B) Procedural History

By written notice received by the Appellant on February 18, 2006, the City of Boston Fire Department issued an Order of Notice to the Appellant informing it of the provisions of M.G.L. c. 148, s.26G½, which requires the installation of an adequate system of automatic sprinklers in certain existing buildings or structures. The building subject to the order is located at 565 Boylston Street, Boston, MA. The Appellant filed an appeal of said order on April 3, 2006. The Board held a hearing relative to this appeal on November 8, 2006, at the Department of Fire Services, Stow, Massachusetts.

Appearing on behalf of the Appellant was Declan Mehigan, General Manager/Owner and Joseph P. Hanley, Esq., attorney for the Appellant. Assistant Fire Marshal for the City, George Wyman and Fire Inspector Lorenzo B. Mathis, represented the Boston Fire Department.

Present for the Board were: Chief Thomas Coulombe, Acting Chairman, Alexander MacLeod, Peter Gibbons, and John J. Mahan. Peter A. Senopoulos, Esquire, was the Attorney for the Board.

C) Issue(s) to be Decided

Whether the Board should affirm, reverse or modify the enforcement action of the Boston Fire Department relative to the subject building in accordance with the provisions of M.G.L. c.148, s. 26G½?

D) Evidence Received

1. Application for Appeal by Appellant
2. Order of Boston Fire Department
3. Memorandum and Exhibits in Support of Appeal
 - A. Fall River Decision (2005-18)
 - B. Inspection Certificate issued 9/20/2005
 - C. Copy of Menu
 - D. Floor Plan of Facility
 - E. Entertainment License
4. Notice of Pre-Hearing Status Conference to Appellant
5. Notice of Pre-Hearing Status Conference to Boston Fire Department
6. Notice of Hearing to Appellant
7. Notice of Hearing to Boston Fire Department
8. Appellant's Submissions (1-9)
9. Fire Department's Submissions (1-6)

E) Subsidiary Findings of Fact

- 1) By notice received by the Appellant on February 18, 2006, the Boston Fire Department issued an Order of Notice to the Appellant requiring the installation of an adequate system of automatic sprinklers in a building located at 565 Boylston Street, Boston, MA in accordance with the provisions of M.G.L. c. 148, s.26G½. This building is leased by Cantona Inc. and operates an establishment by the name of Globe Bar & Grill, a private, for profit organization. The Appellant indicated that the current lease requires that the tenant bear the cost of the installation of a sprinkler installation, if it were required.
- 2) According to the current Certificate of Inspection issued on 12/13/2005, the City of Boston Inspectional Services Department lists the facility's capacity as 122 persons inside, and 28 persons for the outside side walk patio (seasonal). The Certificate does not list separate capacity limits for any bar area, the dining room or second story mezzanine level. The original Certificate of Inspection indicates a use group classification of "BZC Use Item # 37". According to unchallenged testimony, this is a City of Boston Use designation indicative of an A-3 use group under the State Building Code. This State Building Code classification is typical of a restaurant facility. Under both the City of Boston designation and the State Building Code such building classification does not allow such a facility to feature live entertainment.
- 3) Photographs submitted by the Appellant depict, on the first floor, a wide-open area with brick faced walls, and wood finishing. This first floor area consists of fixed wooden booths described

as “banquettes”. It also features a bar with 10 seats and a bar service area used by wait staff to serve seated guests. The mezzanine area features fixed tables. The total area of the establishment consists of mainly fixed seating for 102 persons, including 44 persons allowed in the mezzanine area. The establishment is allowed 20 standees, based upon the total stated occupant load of 122 persons. There is currently no physical or operational separation within the facility which establishes any delineation between a “bar” portion and a “dining area”.

- 4) The establishment holds a full liquor license, which allows “all forms of alcoholic beverages to be drunk on the premises” until 1:00 a.m., seven days a week.
- 5) The restaurant has been issued a restricted entertainment license limited to televisions sets (3) and a cassette/CD player. There is currently no live or recorded entertainment for viewing or dancing purposes. There is no dance floor. Appellant indicated that the recorded music is not loud and is provided solely for dining background music. The televisions are provided for the convenience of customers for general viewing and is not the type of large, multiple screen television configuration typical of a bar that features sports viewing as a customer attraction.
- 6) The facility features a wide assortment of full course dinner meals, including lunch items, with brunch served on the weekends. The “bar area” is also used for the service of meals. However, a customer can patronize this bar area and other areas of the establishment for the purchase of liquor only at any time during the hours of operation. Full food service is provided until 12:00 midnight at all locations, including the bar. A hostess is positioned at the front door until 11:30 p.m. for dinner seating. Alcoholic beverages are served until last call at 1:00 a.m.
- 7) Currently, there are no signs, ornaments, artwork or flags displayed within the establishment that promote alcoholic beverages. Additionally, there are no signs, ornaments or neon lights affixed to the exterior of the building, which promote the sale of alcoholic beverages.
- 8) The Appellant contends that the establishment is principally used as a restaurant and that the existence of the bar is incidental to said principal use. The Appellant further testified that based upon business accounting records, a significant majority of sales are derived from food sales. (60% food and 40% liquor).
- 9) In further support of his Appeal, the Appellant testified that the overall square footage of the facility is approximately 1,920 sq. ft, not including the kitchen/prep area. Appellant testified that based upon the current occupant load, the establishment does not feature a concentrated occupant load of less than 15 s.f. per person.
- 10) The fire department issued the Order to install sprinklers based upon the overall building capacity, the existence of a full bar area, full liquor sales and lack of a physical or operational separation or independent occupant load providing separation between the bar area and dining area. Additionally, Chief Wyman emphasized the ability of patrons to order “liquor only ” any time without ordering food and referred to advertisements, promoting the sale of alcoholic beverages during dinner and Sunday brunch.

F) Ultimate Findings of Fact and Conclusions of Law

- 1) The provisions of the 2nd paragraph of M.G.L. c. 148, s. 26G1/2, in pertinent part states: “ every building or structure, or portions thereof, of public assembly with a capacity of 100 persons or more, that is designed or used for occupancy as a night club, dance hall, discotheque, bar, or similar entertainment purposes...(a) which is existing or (b) for which an approved building permit was issued before December 1, 2004, shall be protected throughout, with an adequate system of automatic sprinklers in accordance with the state building code”. The law was effective as of November 15, 2004.
- 2) The statutory timeline for said sprinkler installation in accordance with the provisions of section 11, St. 2004, c.304, requires the submission of plans and specifications for the installation of sprinklers within 18 months of the effective date of the act (by May 15, 2006) and complete installation within 3 years of the effective date of the act (by November 15, 2007).
- 3) In a memorandum dated 1-10-05, this Board issued an interpretive guidance document relative to the provisions of this new law, c.148, s.26G1/2. This new law was a portion of a comprehensive legislative initiative undertaken as the result of a tragic Rhode Island nightclub fire, which took place in February 2003. In said memorandum, this Board noted that the statute did not contain a definition of the words “nightclub, dance hall, discotheque, bar or similar entertainment purposes”. This Board reviewed the legislative intent and background of the statute and concluded that there were certain characteristics typical of “nightclubs”, “dancehalls” and “discotheques”. The board indicated that such occupancies are characterized, but not limited to, the following factors:
 - a) No theatrical stage accessories other than raised platform;
 - b) Low lighting levels;
 - c) Entertainment by a live band or recorded music generating above-normal sound levels;
 - d) Later-than-average operating hours;
 - e) Tables and seating arranged or positioned so as to create ill defined aisles;
 - f) A specific area designated for dancing;
 - g) Service facilities primarily for alcoholic beverages with limited food service; and
 - h) High occupant load density.

It was the interpretation of this board that such characteristics are typical of the “A-2 like” occupancy (which was a general reference to the A-2 use group referenced in 780 CMR, The State Building Code) and that these are the type of factors that heads of fire departments should consider in enforcing the sprinkler mandates of M.G.L. c.148, s.26G ½. It was noted that the list of characteristics were not necessarily all-inclusive. Additionally, the factors may be applied individually or in combination depending upon the unique characteristics of the building at the discretion of the head of the fire department.

- 4) The evidence presented at the hearing indicates that this establishment clearly does not feature, nor is it legally allowed to currently feature, those characteristics described as “A-2 like” by this board

and typical of a nightclub or a dance hall. According to the original Certificate of Inspection, the City of Boston "BZC Use Item # 37" designation, as explained at the hearing, is typical of a restaurant and does not legally allow the live entertainment activities typical of an A-2 like establishment. The representatives of the Boston Fire Department agree with the conclusion that this is not an "A-2 like" entertainment venue. However, they indicate that the Order was issued because of the current occupancy load of over 100 and certain "bar like" characteristics that appear to exist.

- 5) The Board notes that M.G.L. c. 148, s. 26G ½ is not limited only to certain buildings or portions thereof designed or used for occupancy as a nightclub, dance hall or discotheque which feature "A-2 like" characteristics as described herein. The statute also clearly applies to a "bar", which may not necessarily feature the A-2 like characteristics of a nightclub, dance hall discotheque. The Board is also well aware that the statute specifically exempts establishments from the sprinkler system requirements that are "used principally...as a restaurant". In its 1-10-05 memorandum the Board acknowledged the existence of establishments that may feature characteristics of both a restaurant and a bar or nightclub. In determining whether or not such "combination" establishments are subject to the provisions of M.G.L. c. 26G ½ this Board looks at such common sense factors such as:
- a) Does the restaurant establishment regularly and routinely serve meals on a daily basis?
 - b) Does the establishment provide a bar, bar seating, bar standing and a bartender for the purposes of serving alcoholic beverages directly to alcohol consuming customers?
 - c) Does the bar and bar seating area have the ability to expand into the dining area to accommodate special entertainment activities or increased capacity/density.
 - d) If the establishment provides a bar and bar seating, are alcoholic beverages continuously served to customers more than one hour after full kitchen facilities have been closed?
 - e) Is live or recorded music provided for dancing purposes or for a viewing audience? (does not include background dinner music)?
 - f) Does the establishment provides special entertainment, including but not limited to: musical, theatrical, comedy, or sport viewing activities?
 - g) Based upon the establishment's name, décor, atmosphere, does a customer expect a bar or nightclub type establishment?
 - h) Is the establishment or portions thereof routinely or regularly used for private or public functions for dancing, parties, celebrations, entertainment or performance purposes?
 - i) Does the establishment have an entertainment license?

- 6) These factors are not necessarily all inclusive. However, such factors or combination of factors are taken into consideration in determining whether the statute will apply to certain establishments which may feature the combined characteristics of a restaurant and a bar or nightclub, dance hall or discotheque.
- 7) Based upon the evidence provided at the hearing, as applied to the aforementioned factors, this establishment features the following characteristics:
- a) It regularly and routinely serves meals on a daily basis. Such meals include: lunch, dinner and a brunch meal on the weekends. Such meals are significant and are typical of a full service restaurant, rather than the type of light fare offered at establishments principally designed to attract patrons for drinking purposes.
 - b) The establishment provides a bar, bar seating, bar standing and a bartender for the purposes of serving alcoholic beverages directly to alcohol consuming customers. However, the board finds that bar seating is limited and that the bar is incidental to the principal use of the establishment and used by wait staff to serve diners who are seated throughout the establishment and eating a meal.
 - c) The bar and bar seating area does not have the tendency to expand into the dining area to accommodate special entertainment activities or increased capacity/density. The great majority of seating in this establishment is fixed. The establishment does not feature any live entertainment, which would cause customers to congregate in one area of the facility therefore resulting in a crowding situation.
 - d) The establishment does not provide bar service or bar seating for the purposes of selling alcoholic beverages to customers more than one hour after full kitchen facilities have been closed. Full food service is provided until 12:00 midnight. Alcoholic beverages are served until last call at 1:00 a.m.
 - e) Live or recorded music is not provided at any time for dancing purposes or for a viewing audience.
 - f) The establishment does not provide special entertainment, including but not limited to: musical, theatrical, comedy, or sports viewing activities. A limited number of television sets are provided for the convenience of customers for general television viewing. This establishment does not feature the multiple uses of big screen televisions that are visible throughout the facility, thus indicating the configuration typical of a bar that features sports viewing as an important entertainment attraction.
 - g) This facility does not feature a décor or atmosphere typical of bar or nightclub-type establishment. Currently, there are no signs, ornaments, artwork or flags displayed within the establishment that promote the sale of alcoholic beverages. There are no signs, ornaments or neon lights affixed to the exterior of the building, which promote the sale of alcoholic beverages. This Board notes that the name of the establishment: "Globe Bar

and Grill”, tends to indicate that the establishment features “bar-like” accommodations. In prior determinations, this Board has found that the name of an establishment is often an important factor in determining customer expectation. However, a determination by this Board to require a system of automatic sprinklers, based solely upon the name of an establishment, without additional supporting characteristics, would not be consistent with either the intent of the law or the obligation of this Board to conduct a thorough analysis of all relevant factors.

- h) The establishment or portions thereof is not routinely or regularly used for private or public functions for dancing, parties, celebrations, entertainment or performance purposes. There was testimony indicating that the mezzanine area is often used for private group dinner seating. However there was no evidence of any significance, which indicates that dancing, music, entertainment or any “A-2 like” activities occur at said group events.
- i) The establishment does not have the type of entertainment license, which legally allows live entertainment or recorded music associated with a nightclub, dance hall or discotheque setting.

G) Decision and Order

Based upon aforementioned findings, together with the evidence presented at the hearing, the board concludes that this particular establishment, as currently used and designed, is “principally a restaurant” and is therefore not subject to the enhanced automatic sprinkler system requirements of M.G.L. c. 148, s. 26G ½. This determination is conditioned upon the continued operation of the establishment in accordance with the findings stated in paragraph F. 7), a) through i). This determination does not preclude the possible temporary permit options contained in the statute. (see: M.G.L. c. 148, s. 26G ½, 4th paragraph) This section allows the temporary use of such places of assembly (including restaurants) as a nightclub, dance hall, discotheque or bar, or similar entertainment purpose without the need to install a sprinkler system if a permit is issued by the head of the fire department in consultation with the building inspector. The head of the fire department may set the terms and conditions of said permit to protect against fire and preserve public safety.

For the foregoing reasons, this Board unanimously **reverses** the Order of the Boston Fire Department to install sprinkler protection in the subject building in accordance with the provisions of M.G.L. c.148, s.26G½ subject to said stated conditions,

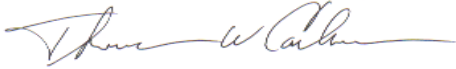
H) Vote of the Board

Chief Thomas Coulombe, Acting Chairman	In Favor
Alexander MacLeod	In Favor
Peter E. Gibbons	In Favor
John J. Mahan	In Favor

I) Right of Appeal

You are hereby advised that you have the right, pursuant to section 14 of chapter 30A of the General Laws, to appeal this decision, in whole or in part, within thirty (30) days from the date of receipt of this order.

SO ORDERED,

A handwritten signature in blue ink, appearing to read "Thomas Coulombe", written over a horizontal line.

Thomas Coulombe, Acting Chairman

Dated: January 29, 2007

A COPY OF THIS DECISION AND ORDER WAS FORWARDED BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED TO: Joseph P. Hanley, Esq., 21 Custom House Street, Boston, Massachusetts 02110 **and 1st Class Mail, Postage Pre-paid to:** Chief George Wyman, Boston Fire Department – Fire Prevention, 1010 Massachusetts Ave, 4th Floor, Boston, Massachusetts 02118.